

U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue date: 28Sep2001

DATE:
CASE NO. 2001-INA-92

In the Matter of:

HI-FIVE, INC., d/b/a JACKPOT FOOD MART
Employer

On Behalf of:

RAMZAN ALI MISTRY
Alien

Appearance: Wade J. Chernick, Esquire
For the Employer

Certifying Officer: Pandora L. Wong
Regional Administrator: Armando Quiroz
San Francisco, California

Before: Holmes, Vittone, and Wood
Administrative Law Judges

JOHN C. HOLMES
Administrative Law Judge

DECISION AND ORDER

This case arose from the Employer's request for review of the denial by a U.S. Department of Labor Certifying Officer ("CO") of an application for labor certification. The certification of aliens for permanent employment is governed by Section 212(a)(5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. §1182(a)(5)(A)(the "Act"), and the regulations promulgated thereunder, 20 C.F.R. Part 656.

Under §212(a)(5) of the Act, as amended, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and Attorney General that, at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work: (1) there are not sufficient workers in the United States who are able, willing,

qualified, and available; and (2) the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

An employer who desires to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. Part 656 have been met. These requirements include the responsibility of the employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means in order to make a good faith test of U.S. worker availability.

The following decision is based on the record upon which the CO denied certification and the Employer's request for review, as contained in the Appeal File ("AF"), and any written arguments of the parties. 20 C.F.R. §656.27(c).

Statement of the Case

On January 14, 1998, the Employer, Hi-Five, Inc., d/b/a Jackpot Food Mart, filed an application for labor certification to enable the Alien, Ramzan Ali Mistry, to fill the position of Bookkeeper (AF 20). The job duties for the position, as stated on the application, are as follows:

Records all financial transactions on behalf of convenience store and gas station.
Balances books and compiles reports and summarization of accounts payables, accounts receivables, balance sheets, merchandise receipts, inventory control analysis, fixed assets, and cash receipts. Prepares Profit and Loss reports. Calculates employee wages and prepares withholding, social security and state and federal tax reports. Summarizes all transactions into suitable format for accounting/auditing review. Balance daily sales and deposit cash in the Bank. Prepare quarterly payroll report for state and calculate Labor & Industries quarterly report. Reconcile Bank Statement with daily ATM reports.

(AF 20, Item 13). The stated job requirements for the position are as follows: two years of experience in the job offered; and "Other Special Requirements" - "1. Inventory control analysis reporting 2. Profit & Loss reports" (AF 20, Items 14-15).¹

In a Notice of Findings ("NOF") issued on August 21, 2000, the CO proposed to deny certification on the following grounds: 1. The stated job requirements appear to be unduly restrictive and in violation of §656.21(b)(2)(i)(A); and, 2. The Employer's effort to contact qualified U.S.

¹The "Other Special Requirements" are redundant, since the Employer's requirement of two years of experience in the job offered incorporates the stated job duties, which include Inventory control analysis and Profit & Loss reports (AF 20; Items 13-15).

applicant Piersol was “tardy and incomplete,” thereby indicating a lack of good faith recruitment efforts, in violation of §656.21(b)(6) and §656.20(c)(8). (AF 14-17). The Employer submitted its rebuttal on or about September 22, 2000 (AF 9-13). The CO found the rebuttal unpersuasive, and issued a Final Determination, dated November 7, 2000, denying certification on the same bases (AF 7-8). Subsequently, the Employer appealed the Final Determination (AF 2-5), and the CO forwarded this matter to the Board of Alien Labor Certification Appeals (AF 1).²

Discussion

As stated above, the CO denied certification on two bases; namely, that the Employer listed unduly restrictive requirements; and, that Employer did not show good faith in its recruitment effort of applicant Piersol.

In the NOF, the CO challenged the Employer’s “restrictive requirements,” stating, in pertinent part:

Regulatory Basis: The following job requirement appears to be unduly restrictive and in violation of 20 CFR 656.21(b)(2)(i)(A) in that it is not normally required for the successful performance of the job in the United States. Abnormal requirements would preclude referral of otherwise qualified U.S. workers.

Finding: The requirement considered restrictive is two years experience balancing books, compiling reports, preparing profit and loss reports, summarizing all transactions into suitable format for accounting/audit review.

These duties go beyond the scope of bookkeeper duties given in the DOT. You describe an accounting position instead.

Corrective Action: To correct deficiencies, you may chose (sic) option A or B.

A) To amend the restrictive requirement...

B) To justify the requirement based on business necessity:

...Or...you must submit documentation that the requirements are usual in the

²In the CO’s letter, dated January 4, 2001, he stated that the Employer’s Request for Reconsideration is denied, and that the case file is being transmitted to the Board of Alien Labor Certification Appeals (AF 1). However, we find that the Employer simply filed a request for review, and that it never even filed a reconsideration request (AF 4-6).

occupation/industry.

(AF 15).

In its rebuttal, the Employer stated, in pertinent part, that the job requirements are consistent with those set forth in the Dictionary of Occupational Titles (D.O.T.) for the position of bookkeeper, and the related Specific Vocational Preparation (SVP) code. Thus, the Employer stated that, contrary to the CO's assertion, the stated job requirements are not unduly restrictive (AF 10-11).

The D.O.T. for the position of bookkeeper is set forth below:

210.382-014 BOOKKEEPER (clerical)

Keeps records of financial transactions for establishment, using calculator and computer: Verifies, allocates, and posts details of business transactions to subsidiary accounts in journals or computer files from documents, such as sales slips, invoices, receipts, check stubs, and computer printouts. Summarizes details in separate ledgers or computer files and transfers data to general ledger, using calculator or computer. Reconciles and balances accounts. May compile reports to show statistics, such as cash receipts and expenditures, accounts payable and receivable, profit and loss, and other items pertinent to operation of business. May calculate employee wages from plant records or time cards and prepare checks for payment of wages. May prepare withholding, Social Security, and other tax reports. May compute, type, and mail monthly statements to customers. May be designated according to kind of records of financial transactions kept, such as Accounts-Receivable Bookkeeper (clerical), and Accounts-Payable Bookkeeper (clerical). May complete records to or through trial balance.

Dictionary of Occupational Titles, 210.382-014

The Specific Vocational Preparation ("SVP") for the position of Bookkeeper is "6." Accordingly, the experience requirement may be over 1 year up to and including 2 years.

Notwithstanding the fact that the stated job requirements are consistent with the D.O.T. and the SVP, the CO denied certification, stating, in pertinent part:

First of all, we note this position is not supervised by an accountant, it is supervised (by) the president. Then, we note the duties as described are not preparative in nature but active, for example: balances books, rather than prepares books for balancing. The duties as described go beyond the nature of duties normal for the occupation of bookkeeper.

(AF 8).

Having considered the CO's Final Determination regarding this issue, we find it lacks merit and constitutes an abuse of discretion., as discussed later. Accordingly, the CO cannot deny certification on this basis. We must, then, consider the second basis for the denial of certification namely, the Employer's purported lack of a good faith effort to recruit U.S. applicant Piersol.

An employer must show that U.S. applicants were rejected solely for lawful job-related reasons. 20 C.F.R. §656.21(b)(6). Therefore, an employer must take steps to ensure that it has obtained lawful, job-related reasons for rejecting U.S. applicants, and not reject U.S. applicants for subjective reasons which are either undocumented or unverifiable.

Although the regulations do not explicitly state a "good faith" requirement in regard to post-filing recruitment, such good faith requirement is implicit. *H.C. LaMarche Enterprises, Inc.*, 1987-INA-607 (Oct. 27, 1988). Actions by an employer which indicate a lack of good faith recruitment effort, or actions which prevent qualified U.S. workers from further pursuing their applications are, therefore, a basis for denying certification. In such circumstances, the employer has not proven that there are not sufficient United States workers who are "able, willing, qualified and available" to perform the work. 20 C.F.R. §656.1.

In the Notice of Findings, the CO challenged the Employer's recruitment effort, stating, in pertinent part:

Basis in Precedent: Efforts made by the employer to contact an applicant more than 14 days after receipt of a resume may not be a timely contact and may indicate a failure on the employer's part to recruit in good faith. The rejection of U.S. workers also would be considered as not based on valid, job-related reasons (20 CFR §656.21(b)(6)) and the job opportunity would not be considered to be clearly open to any qualified U.S. worker. (656.20(c)(8)).

Finding: Job Service Office sent a resume to you on 22 May 1998. There is insufficient evidence your effort to contact qualified applicant PIERSOL took place timely.

Positive contact efforts include both attempts in writing (supported by dated return receipts) and by telephone (supported by phone bills). The evidence in hand is not convincing your efforts to contact applicants took place at all, or "as early as possible" as EDD had directed. The recruitment is considered tardy and incomplete.

Corrective Action: If you contend this conclusion is inaccurate, submit a rebuttal giving details of your attempt(s) to interview the U.S. applicant.

(AF 16).

In its rebuttal, the Employer stated, in pertinent part, that they had attempted to contact Ms. Piersol in a timely manner by certified mail; that she failed to pick up the letter; that they subsequently called her and she had stated that she is not interested in the position, because the salary is too low and she did not want to relocate or commute from Reno to Hawthorne, Nevada. Furthermore, the Employer noted that they had previously submitted documentation regarding the certified mailing, and that they could not supply a phone bill because Ms. Piersol resides within the same area code as the Employer's place of business. Alternatively, the Employer suggested that the CO could verify the matter by contacting Ms. Piersol (AF 11-12).

Notwithstanding the Employer's rebuttal, the CO denied certification, stating, in pertinent part:

NOF indicated there is insufficient evidence you made a good-faith effort to recruit applicant PIERSOL. You rebut you made a timely contact effort.

However, you do not respond to the NOF request for **documentation** of a timely effort. You have not provided sufficient evidence of a compliant recruitment effort.

(AF 8). (Emphasis in original).

Having considered the documentary evidence previously presented and Employer's rebuttal, we find that the CO's Final Determination regarding this issue, also lacks merit.

In making this determination, we first note that CO stated that the "Job Service sent a resume to you on 22 May 1998." (AF 16). Assuming the Employer received the resume the very next day (*i.e.*, May 23, 1998), the documentation presented clearly establishes that the Employer mailed the certified letter to Ms. Piersol on June 5, 1998 (*i.e.*, 13 calendar days later)(AF 33). Moreover, we take judicial notice that the 13 day-period between May 23, 1998 and June 5, 1998 includes weekends and Memorial Day. We do *not* find that such a delay, on its face, establishes a lack of good faith. (*See, e.g., Kellogg Supply, Inc.*, 1993-INA-172 (May 11, 1994)(where the Board held that a lapse of 18 days between the time an employer received a resume from a State agency until it attempted to contact an applicant did not, on its face, establish lack of good faith recruitment); *Cf. Robert White*, 1994-INA-173 (Feb. 14, 1995)(where Employer's delay of three weeks was deemed untimely). Additionally, the Employer further documented Ms. Piersol's failure to pick up the certified letter. Specifically, the documentary evidence offered by the Employer clearly establishes that Ms. Piersol did not claim the certified letter upon first and second notices, dated June 8th and June 23rd, respectively. Furthermore, the Employer also presented documentary evidence that the letter was returned to the Employer on June 29th (AF 32). In its recruitment report, dated July 22, 1998 (AF 26-27), the Employer also explained that they followed-up the certified letter with a telephone call, and that Ms. Piersol explained that the P.O. Box which she had provided on her resume (AF 35) is for business

correspondence, and “she only checks it once per month.” (AF 27). The Employer also represented that they had discussed the position by telephone, but that Ms. Piersol was not interested because she did not want to commute nor move from Reno to Hawthorne, nor would she accept the salary offered (AF 26-27).

As stated above, the CO sought documentation of the attempted contacts by certified mail “(supported by dated return receipts)” and by telephone “(supported by phone bill)” (AF 16). However, the CO apparently failed to consider the documentary evidence presented regarding the certified mail (AF 32-34), and ignored the Employer’s explanation regarding the absence of a phone bill on the basis of the Employer and Ms. Piersol being located in the same area code (AF 12). Furthermore, the CO did not contact Ms. Piersol for verification, as suggested by the Employer, but rather summarily denied certification.

In view of the foregoing, we find that certification was not properly denied by the CO and that reversal is appropriate herein.

ORDER

The Certifying Officer's denial of labor certification is hereby REVERSED and the Certifying Officer is hereby ordered to GRANT labor certification.

For the Panel:

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JOHN C. HOLMES
Administrative Law Judge

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure and maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

**Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002**

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced typewritten pages. Responses, if any, shall be filed within ten days of the service of the petition, and shall not exceed five double-spaced typewritten pages. Upon granting of the petition the Board may order briefs.